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CIMB Bank Bhd v Azivest Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC–590 OF 2009
ONG CHEE KWAN J
10 MAY 2024

C

Civil Procedure — Summary judgment — Enforcement of — Leave to execute summary judgment against guarantor under banking facilities — Lapse of more than 12 years — Whether s 6(3) of Limitation Act 1953 an absolute bar after expiry of 12 years from date of judgment — Rules of Court 2012 O 46 rr 2 & 3

D

Limitation — Enforcement of judgment — Summary judgment — Lapse of more than 12 years — Leave to execute summary judgment against guarantor under banking facilities — Bank and guarantor enter into settlement agreements with guarantor after judgment — Whether judgment superseded by settlement agreements — Whether settlement agreement preserved plaintiff's banks right to enforce judgment — Whether limitation had set in — Whether s 6(3) of Limitation Act 1953 an absolute bar after expiry of 12 years from date of judgment

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Enclosure 16 was the plaintiff's application to obtain leave to execute a summary judgment dated 18 May 2010 ('the judgment') made made against, inter alia, the second defendant for various sums in respect of banking facilities that was granted by the plaintiff to the first defendant ('the judgment'). The second defendant was one of guarantors for the banking facilities. After the plaintiff had obtained the judgment, the plaintiff had entered into two compromise agreement, in which judgment sum was not fully settled as the second defendant had defaulted in making the payments as promised. Thereafter the plaintiff entered into two separate settlement agreements with the second defendant, namely the 2021 settlement agreement and the 2023 settlement agreement. Despite these settlement agreements, the second defendant consistently failed to make full payments. As more than 12 years had elapsed from the judgment, the plaintiff filed the present application. The issues that arose for determination were: (a) whether the judgment superseded by the 2023 settlement agreement; and (b) whether s 6(3) of the Limitation Act 1953 ('the Act') was relevant and constituted an absolute bar after the expiry of 12 years from the date of the judgment.

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Held, dismissing the encl 16:

(1) Notwithstanding the judgment, the plaintiff had agreed by the 2023 settlement agreement to accept the payment of a sum of

RM350,000 from the second defendant, including the sum of RM62,500 paid previously under the 2021 settlement agreement, as full and final settlement of the second defendant's obligations as guarantor under the judgment. The 2023 settlement agreement contained no provisions preserving the plaintiff's rights to enforce the judgment in the event the second defendant defaulted in his obligations to pay the agreed settlement sum under the said agreement (see paras 43–44).

(2) Insofar as the plaintiff's rights under the 'facility documents', these rights had since merged with the judgment and no longer existed. Further, plaintiff's rights under the 2023 settlement agreement to commence fresh bankruptcy proceedings and or actions to enforce its rights 'in the matter', did not refer to the judgment but the rights under the 2023 settlement agreement. This meant that the plaintiff's rights under the judgment had been superseded by the terms of the 2023 settlement agreement. The judgment was no longer available for the plaintiff to enforce against the second defendant when the plaintiff entered into the 2023 settlement agreement with the second defendant. Therefore, the plaintiff's application under encl 16 had no merits and on this ground alone, must be dismissed (see paras 45–47).

(3) The plaintiff had proceeded with its application under encl 16 on the premise that s 6(3) of the Act was applicable where more than 12 years have lapsed since the date of the judgment or order which was sought to be enforced. It was premised on the assumption that the said s 6(3) applied to execution proceedings and that there was an absolute bar to any execution of a judgment after 12 years. However, this was not the case. The first limb of s 6(3) of the Act referred to 'an action upon any judgment'. This referred to a fresh action commenced on a judgment and not to execution proceedings on a judgment, which was a procedural step taken to enforce a judgment. This meant that the commencement of execution proceedings, which was a continuation of the judgment could not be considered as 'an action upon a judgment' under the s 6(3) of the Act (see paras 51–53).

(4) The plaintiff was seeking leave under O 46 rr 2 and 3 of the Rules of Court 2012 ('the ROC') to proceed with a fresh bankruptcy notice against the second defendant. Even if leave could be obtained by the plaintiff to proceed with execution under O 46 rr 2 and 3 of the ROC, since more than 12 years have elapsed, any bankruptcy proceeding against the second defendant based on the judgment would have been statute barred in any case. This was because the 12 year limit set in s 6(3) of the Act was an absolute bar (see paras 96 & 99).

[Bahasa Malaysia summary

Lampiran 16 adalah permohonan plaintif untuk mendapatkan kebenaran untuk melaksanakan penghakiman ringkas bertarikh 18 Mei 2010 ('penghakiman tersebut') yang dibuat terhadap, antara lain, defendan kedua untuk pelbagai jumlah berkenaan dengan kemudahan perbankan yang diberikan oleh plaintif kepada defendan pertama ('penghakiman tersebut'). Defendan kedua adalah salah seorang penjamin untuk kemudahan perbankan. Selepas plaintif memperoleh penghakiman, plaintif telah memeterai dua perjanjian kompromi, di mana jumlah penghakiman tidak diselesaikan sepenuhnya kerana defendan kedua telah gagal membuat pembayaran seperti yang dijanjikan. Selepas itu plaintif telah memeterai dua perjanjian penyelesaian berasingan dengan defendan kedua, iaitu perjanjian penyelesaian 2021 dan perjanjian penyelesaian 2023. Walaupun perjanjian penyelesaian ini, defendan kedua secara konsisten gagal membuat pembayaran penuh. Memandangkan lebih daripada 12 tahun telah berlalu dari penghakiman tersebut, plaintif telah memfailkan permohonan ini. Isu-isu yang timbul untuk penentuan ialah: (a) sama ada penghakiman tersebut digantikan oleh perjanjian penyelesaian 2023; dan (b) sama ada s 6(3) Akta Had Masa 1953 ('Akta tersebut') adalah relevan dan merupakan penghalang mutlak selepas tamat tempoh 12 tahun dari tarikh penghakiman tersebut.

Diputuskan, menolak lampiran 16:

(1) Walaupun terdapat penghakiman tersebut, plaintif telah bersetuju dengan perjanjian penyelesaian 2023 untuk menerima pembayaran sejumlah RM350,000 daripada defendan kedua, termasuk jumlah RM62,500 yang dibayar sebelum ini di bawah perjanjian penyelesaian 2021, sebagai penyelesaian penuh dan muktamad untuk defendan kedua sebagai penjamin di bawah penghakiman tersebut. Perjanjian penyelesaian 2023 tidak mengandungi peruntukan yang memelihara hak plaintif untuk menguatkuasakan penghakiman sekiranya defendan kedua gagal memenuhi kewajipannya untuk membayar jumlah penyelesaian yang dipersetujui di bawah perjanjian tersebut (lihat perenggan 43–44).

(2) Setakat mana hak plaintif di bawah 'dokumen-dokumen kemudahan', hak-hak ini telah bergabung dengan penghakiman tersebut dan tidak lagi wujud. Selanjutnya, hak plaintif di bawah perjanjian penyelesaian 2023 untuk memulakan prosiding kebankrapan baharu dan/atau tindakan untuk menguatkuasakan haknya 'dalam perkara tersebut', tidak merujuk kepada penghakiman tetapi hak di bawah perjanjian penyelesaian 2023. Ini bermakna hak plaintif di bawah penghakiman telah digantikan oleh terma perjanjian penyelesaian 2023. Plaintif tidak boleh lagi menguatkuasakan penghakiman tersebut terhadap defendan kedua apabila plaintif menandatangani perjanjian penyelesaian 2023

dengan defendan kedua. Oleh itu, permohonan plaintif di bawah lampiran 16 tidak mempunyai merit dan atas alasan ini sahaja, haruslah ditolak (lihat perenggan 45–47).

(3) Plaintif telah meneruskan permohonannya di bawah lampiran 16 atas alasan bahawa s 6(3) Akta tersebut terpakai di mana lebih daripada 12 tahun telah berlalu sejak tarikh penghakiman atau perintah yang dipohon untuk dikuatkuasakan. Ianya berdasarkan andaian bahawa s 6(3) tersebut digunakan untuk prosiding pelaksanaan dan terdapat halangan mutlak untuk sebarang pelaksanaan penghakiman selepas 12 tahun. Walau bagaimanapun, hal ini tidak berlaku. Bahagian pertama s 6(3) Akta tersebut merujuk kepada 'tindakan atas sebarang penghakiman'. Ini merujuk kepada tindakan baru yang dimulakan pada penghakiman dan bukannya kepada prosiding pelaksanaan ke atas penghakiman, yang merupakan langkah prosedur yang diambil untuk menguatkuasakan penghakiman. Ini bermakna bahawa permulaan prosiding pelaksanaan, yang menunjukkan bahawa penghakiman tidak boleh dianggap sebagai 'tindakan ke atas penghakiman' di bawah s 6(3) Akta tersebut (lihat perenggan 51–53).

(4) Plaintif telah memohon kebenaran di bawah A 46 kk 2 dan 3 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk meneruskan notis kebankrapan baru terhadap defendan kedua. Walaupun kebenaran boleh diperolehi oleh plaintif untuk meneruskan pelaksanaan di bawah A 46 kk 2 dan 3 KKM, memandangkan lebih daripada 12 tahun telah berlalu, sebarang prosiding kebankrapan terhadap defendan kedua berdasarkan Penghakiman tersebut akan terhalang dalam apa jua keadaan. Hal ini kerana had masa 12 tahun yang menurut s 6(3) Akta merupakan satu halangan mutlak (lihat perenggan 96 & 99).]

Cases referred to

AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal [2013] 3 MLJ 179; [2013] 3 CLJ 317, FC (refd)

Daud v Ibrahim [1961] MLJ 43, CA (not folld)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1; [2015] 4 CLJ 561, FC (refd)

Jay v Johnstone [1893] 1 QB 189, CA (refd)

Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (Sued as a Firm) [2002] 6 MLJ 579, HC (refd)

Lim Ah Hee Sim Ah Hee, Re, ex p Perwira Affin Bank Bhd [1997] MLJU 46, HC (refd)

Lim Ah Hee Sim Ah Hee, Re, ex p Perwira Affin Bank Bhd [2000] 3 MLJ 211, CA (refd)

Lowsley and another v Forbes (t/a L E Design Services) [1998] 3 All ER 897, HL (refd)

National Westminster Bank plc v Powney And Others [1991] Ch 339, CA (refd)

Neo Ong Tew v Neo Ong Tee [1926] SSLR 120, CA (not folld)
Pacific Sanctuary Holdings Sdn Bhd (formerly known as Ideal Prestige Sdn Bhd) v Masaland Construction Sdn Bhd [2020] 3 MLJ 692, CA (folld)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253, FC (refd)
Lim Ah Hee Sim Ah Hee, Re, ex p Perwira Affin Bank Bhd [1997] MLJU 46, HC (refd)
Lim Ah Hee Sim Ah Hee, Re, ex p Perwira Affin Bank Bhd [2000] 3 MLJ 211, CA (refd)
RHB Bank Berhad v Yung Chen Wood Industry Sdn Bhd & Ors [2019] MLJU 1845; [2019] AMEJ 1767, HC (refd)
Seema Development Sdn Bhd v Mah Kim Chye [2014] 2 MLJ 425; [2014] 1 CLJ 804, HC (refd)
Watson v Birch (1874) 15 Sim 523; (1874) 60 ER 721 (refd)
WT Lamb & Sons v Rider [1948] 2 KB 331; [1948] 2 All ER 402, CA (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 3(1)(i)
Common Law Procedure Act [UK] s 128
Limitation Act 1939 [UK] s 2(4)
Limitation Act 1953 ss 2(6)(b), 6(3), 26(2), 27(1)
Limitation Act 1980 [UK] ss 24(1), 38(1)
Real Property Limitation Act 1833 [UK] ss 40, 42
Real Property Limitation Act 1874 [UK] s 8
Rules of Court [UK] O 42 rr 18, 19
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 46 rr 2, 3
Rules of Court 2012 O 46 rr 2, 2(1), 2(1)(a), 3
Rules of the Supreme Court [UK] O 46 r 23
Statute of Westminster the Second (1285) [UK]
Supreme Court of Judicature Act 1875 [UK] s 16

Tay Hong Huat (Janice Khoo Huai Ting with him) (Tay & Helen Wong) for the plaintiff.

Ong Chee Kwan J:

[1] Can a plaintiff who has entered into a settlement agreement with a defendant in full and final settlement of a judgment obtained against the defendant apply for leave to execute the judgment upon the defendant's default of the settlement agreement? Is the judgment superseded by the settlement agreement? In an application under O 46 r 2(1)(a) of the Rules of Court 2012 for leave to enforce a judgment after more than six years have elapsed since the date of the judgment, is s 6(3) of the Limitation Act 1953 ('the 1953 Act') relevant and constitutes an absolute bar after the expiry of 12 years from the date of the judgment? These are the issues dealt with in this judgment.

A BACKGROUND FACTS

[2] Enclosure 16 is the plaintiff's application filed on 15 March 2024 to obtain leave to execute a summary judgment dated 18 May 2010 made against, inter alia, the second defendant for various sums in respect of banking facilities that was granted by the plaintiff to the first defendant ('the judgment').

[3] The first defendant has been wound up on 9 July 2019. The second and third defendants were guarantors for the banking facilities extended by the plaintiff to the first defendant.

[4] Enclosure 16 is filed pursuant to O 46 rr 2 and 3 of Rules of Court 2012 ('the ROC 2012').

[5] After the judgment was obtained on 18 May 2010, the plaintiff commenced a petition to wind up the first defendant on 8 August 2012 and also issued notice of bankruptcy against the second defendant simultaneously.

[6] The aforesaid actions resulted in a compromise agreement in late 2012 ('2012 compromise agreement') where time was given to the second defendant to settle the judgment sum. Following the 2012 compromise agreement, the plaintiff withdrew its winding up petition and the notice of bankruptcy against the first defendant and the second defendant respectively in 2013.

[7] However, notwithstanding the 2012 compromise agreement, the judgment sum was not fully settled as the second defendant had defaulted in making the payments as promised. This led to the plaintiff commencing a fresh notice of bankruptcy against the second defendant and the third defendant on 25 March 2015 and a fresh winding up petition against the first defendant on 29 July 2015.

[8] The aforesaid led to the parties reaching another compromise agreement sometime on 15 February 2016 ('the 2016 compromise agreement') where further indulgence was given by the plaintiff for the defendants to settle the outstanding judgment sum. The winding up petition against the first defendant filed on 29 July 2015 was withdrawn.

[9] Unfortunately, the 2016 compromise agreement also did not lead to a full settlement of the judgment.

[10] On 7 November 2016, after more than six years had elapsed from the judgment, the plaintiff issued a letter to the second defendant agreeing to

accept a sum of RM500,000 as settlement of his liability as guarantor and set out a schedule of payment for the RM500,000 ('the 2016 settlement agreement'). The plaintiff also proceeded to withdraw its notice of bankruptcy against the second defendant on 29 December 2016 after the second defendant had made the first payment under the 2016 settlement agreement.

[11] However, the second defendant failed again to make further payments as agreed under the 2016 settlement agreement.

[12] By reason of the aforesaid, on 20 September 2018, the plaintiff filed a notice of application under O 46 r 2 of the ROC 2012 for leave to execute the judgment since, as alluded to above, more than six years had elapsed from the judgment on 18 May 2010 ('the first leave application').

[13] On 9 October 2018, the court granted an order in terms of the first leave application ('the first leave order').

[14] The plaintiff filed a winding up petition against the first defendant after obtaining the first leave order and on 9 July 2019, the plaintiff obtained an order for the first defendant to be wound up.

[15] The plaintiff however did not proceed with any execution against the second defendant. Instead, the plaintiff was contended to give further time to the second defendant to settle the outstanding judgment sum.

[16] When the second defendant failed to make payments to the plaintiff, the plaintiff filed another application for leave to execute the judgment against the second defendant on 22 July 2020 ('the second leave application') since more than one year had elapsed from the first leave order and the court granted the plaintiff an order in terms of the fresh leave application on 20 October 2020 ('the second leave order').

[17] Based on the second leave order, the plaintiff issued a notice of bankruptcy against the second defendant on 17 February 2021. This prompted the second defendant to come forward to discuss settlement again with the plaintiff. In fact, a settlement agreement was entered on 14 October 2021 between the plaintiff and the second defendant ('the 2021 settlement agreement'). With the settlement, the notice of bankruptcy was withdrawn.

[18] After making a payment of RM62,500 under the 2021 settlement agreement, the second defendant failed to make further payments to the plaintiff thereunder. The second defendant's last payment was for a sum of RM2,500 on 15 August 2023. There was still a sum of RM1,278,560.64

remaining outstanding under the judgment.

[19] On 19 August 2023, the second defendant wrote to the plaintiff stating as follows:

> Saya sedang bersungguh-sungguh lagi untuk mendapatkan wang untuk membayar baki akaun pinjaman itu. Dalam tempoh itu saya mohon untuk melanjutkan membayar sebanyak RM 2,500.00 sebulan sehingga Mac 2024.

[20] This led to another discussion and on 20 October 2023, the second defendant and the plaintiff agreed to a fresh settlement agreement ('the 2023 settlement agreement') based on the plaintiff's letter dated 11 September 2023.

[21] Under the 2023 settlement agreement:

(a) the plaintiff shall accept the payment of a sum of RM350,000 from the second defendant (including the sum of RM62,500 paid previously) to discharge its obligations as guarantor ('the agreed settlement sum'); and

(b) the balance agreed settlement sum shall be paid by the second defendant in four instalments, namely, three equal monthly instalments of RM2,500 from 20 September 2023 until 20 November 2023 with the final instalment in the sum of RM280,000 to be paid by 31 December 2023.

[22] The 2023 settlement agreement also contained the following terms:

> 5. Nothing in this letter shall be construed as:
>
> 1. a waiver, forbearance or indulgence by us of any breach or default by you of our rights to commence or proceed with legal or other proceedings or action for the recovery of all amounts owing by the Borrower to us:
>
> 2. a release or discharge of the Borrower and Guarantors from any or all of their respective liabilities, obligations and indebtedness to us under, arising from or in connection with the abovementioned Facility, and
>
> 3. a waiver of the requirement to make prompt and immediate payment by the Borrower: and
>
> 4. a modification and/ or variation and or waiver of any terms and conditions and/ or the Bank's rights and /or powers as contained in any and all security documents executed between the Borrower, Guarantors and the Bank in relation to the above matter nor should It be treated as a departure by the Bank of any of its rights and or any stand taken by the Bank as contained in all previous correspondences exchanged between the Borrower, Guarantors and the Bank, prior to the issuance of this letter.
>
> 8. Please take note that in the event you fail comply with any of the terns as stated in this letter of offer and/or in the event the Bank does not receive any payments as

mentioned in paragraph 3 above, this arrangement shall be deemed terminated and the Bank shall be at liberty to commence fresh Bankruptcy proceeding and/ or continue with any or all actions to enforce the rights of the Bank in the matter, concurrently or otherwise to recover the outstanding sums from you, you HEREBY EXPRESSLY UNDERTAKE not to plead the defence of delay, laches, acquiescence, condonation, and/or limitations in any proceedings taken by the Bank in the relation to the Bank's unfettered rights to enforce their rights against you.

[8]. This letter is issued without prejudice to any of the Bank's rights of recovery or to institute whatsoever execution and/or enforcement proceedings against you. In addition, the issuance of this letter and the contents herein shall not preclude the Bank from instituting and/or resuming/continuing with whatsoever actions deemed appropriate and necessary, and the costs and expenses Incurred will be for the account of the Borrower. All legal and incidental expenses Incurred in this matter and other incidental costs, if any, will be borne by you, and any work relation to the said this payment arrangement is to be handled by our panel of solicitors and the costs of which shall be borne by you.

10. Save as stated above, nothing in this letter shall be taken or construed as prejudicing the Bank's rights and remedies under the Facility, any letters of offer, facility agreement, security documents or other documents relating thereto ('Financing Documents') and that all other terms of the Facility and the Financing Documents shall continue to subsist and remain valid and be of full force and effect until all the liabilities under the above Facility and the Financing Documents have been discharged in full.

(collectively referred as the 'preservation of rights clauses')

[23] Unfortunately, the plaintiff did not receive any payment from the second defendant under the 2023 settlement agreement.

[24] As such, on 11 March 2024, the plaintiff filed encl 16 seeking leave again from this court to execute the judgment against the second defendant. As can be seen, by the time encl 16 was filed, more than 12 years have elapsed from the judgment.

PLAINTIFF'S CONTENTIONS

[25] Learned counsel for the plaintiff premised his submission by stating that since the judgment was obtained on 18 May 2010, under s 6(3) of the 1953 Act, the plaintiff is entitled to bring an action upon the judgment within a period of 12 years, which means that, any execution proceedings on the judgment must be brought by the plaintiff before 18 May 2022.

[26] More specifically, s 6(3) of the 1953 Act states thus:

An action upon any judgment shall not be brought after the expiration of twelve

A years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

B **[27]** However, learned counsel for the plaintiff contended that there has been fresh accrual of the right of action upon the judgment by reason of acknowledgements and part payment by the second defendant. In this regard, learned counsel for the plaintiff relied on s 26(2) of the 1953 Act which reads:

C (2) *Where any right of action has accrued to recover any debt* or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, *and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment* ... (Emphasis added.)

D **[28]** According to learned counsel for the plaintiff, the aforesaid s 26(2) is to be read with s 27(1) of the 1953 Act, which stipulates:

E (1) Every such acknowledgment as is referred to in section 26 ... shall be in writing and signed by the person making the acknowledgment.

[29] On the facts of the present case, learned counsel for the plaintiff submitted that there were two acknowledgements and one last part-payment as follows:

F (a) the acknowledgments — the second defendant's request on 19 August 2023 and the 2023 settlement agreement signed by the second defendant on 20 October 2023 acknowledging the settlement sum of RM350,000 in accordance with the scheduled instalments payment plan; and

G (b) the part-payment — the second defendant's last payment was RM2,500 on 15 August 2023.

[30] It was contended that by virtue of the acknowledgments of the debt, the H right of action upon the judgment in s 6(3) of the 1953 Act is deemed to have accrued on 19 August 2023 or 20 October 2023 at the latest, by virtue of s 26(2) of the Act. This means that the plaintiff's right to enforce the judgment has been extended by a further 12 years from the date of acknowledgment to 19 August 2035 or 20 October 2035 at the latest.

I **[31]** Further, by virtue of the last part-payment on 15 August 2023, the right of action on the judgment is deemed to have accrued on 15 August 2023 by virtue of s 26(2) of the Act. The period of limitation has effectively been extended to 15 August 2035.

[32] In either case, the limitation period to enforce or execute the judgment has not expired. Therefore, the plaintiff contended that judicial discretion ought to be exercised in favour of the granting of the leave application to execute the judgment.

[33] Learned counsel for the plaintiff further submitted that the second defendant is estopped from raising any defence of limitation. This is because under cl 8 of 2023 settlement agreement, it is expressly provided that in the event of default by the second defendant, the plaintiff is entitled to commence fresh bankruptcy proceeding and or continue with any or all actions to enforce the rights of the plaintiff to recover the outstanding sums from second defendant and the second defendant has expressly undertaken not to plead the defence of delay, laches, acquiescence, condonation and or limitation in any proceedings taken by the plaintiff.

[34] Learned counsel for the plaintiff referred this court to the following cases:

(a) *RHB Bank Berhad v Yung Chen Wood Industry Sdn Bhd & Ors* [2019] MLJU 1845; [2019] AMEJ 1767, High Court;

(b) *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (Sued as a Firm)* [2002] 6 MLJ 579, High Court; and

(c) *Seema Development Sdn Bhd v Mah Kim Chye* [2014] 2 MLJ 425; [2014] 1 CLJ 804, High Court.

[35] The above three cases will be dealt with below.

[36] It was contended by learned counsel for the plaintiff that in the present case, the delay in the execution of the judgment was due to the repeated requests by the second defendant for indulgence to settle the judgment debt which resulted in 2021 settlement agreement and 2023 settlement agreement entered into by both parties.

[37] Further, since the second defendant did commit a default in the instalment payment plan, the plaintiff is compelled to seek leave to execute the judgment. There are exceptions provided for to extend the limitation period of 12 years, which are s 26(2) of the 1953 Act, giving rise to fresh accrual of action based on acknowledgement and or part payment. The facts and events in this case satisfy both exceptions and that warrants an extension of limitation period.

[38] Learned counsel for the plaintiff contended that the exceptions in s 26(2) of the 1953 Act (ie acknowledgement and part payment) are applicable, inter alia, to 'any right of action to recover any debt or other liquidated

pecuniary claim'. The phrase 'right of action' includes right of an action upon a judgment as provided in s 2(6)(b) of the Act which states:

> In Part III of this Act references to a right of action shall include references to a cause of action and a right to receive money secured by a mortgage or charge on any property or to recover proceeds of sale of land, and to a right to receive a share or interest in the personal estate of a deceased person and references to the date of the accrual of a right of action shall —
>
> (a) ...
>
> (b) In the case of an action upon a judgment, be construed as references to the date on which the judgment became enforceable;
>
> (c) ...

[39] Learned counsel for the plaintiff also submitted that bankruptcy proceeding is an action upon a judgment, ie an action to enforce a judgment: (see *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179; [2013] 3 CLJ 317, (FC)). This part of the judgment was not overruled by Federal Court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1; [2015] 4 CLJ 561 which had ruled that a judgment creditor who commences bankruptcy proceedings after more than six years had lapsed from the date of judgment must obtain the prior leave of the court pursuant to O 46 r 2 of the Rules of the High Court 1980.

COURT'S CONSIDERATIONS

Whether judgment superseded by the 2023 settlement agreement

[40] In the present case, after the plaintiff had obtained the judgment, the plaintiff had entered into two separate settlement agreements with the second defendant, namely the 2021 settlement agreement and the 2023 settlement agreement. This gives rise to the question whether the judgment had been superseded by the said settlement agreements, in particularly the 2023 settlement agreement.

[41] On this point, the Court of Appeal case of *Pacific Sanctuary Holdings Sdn Bhd (formerly known as Ideal Prestige Sdn Bhd) v Masaland Construction Sdn Bhd* [2020] 3 MLJ 692 ('Pacific Sanctuary') is instructive.

[42] In *Pacific Sanctuary,* a default judgment was entered against the defendant. Thereafter, the plaintiff and the defendant entered into a settlement agreement where the plaintiff agreed not to enforce on all and or any of its claims under the judgment in return for the defendant agreeing to pay an agreed sum partly in cash and partly by contra of properties. After the

defendant had defaulted in its obligations under the settlement agreement, more than six years had lapsed since the judgment and the plaintiff applied for leave to execute the judgment. The Court of Appeal held that there was no longer any pending judgment to be enforced as the judgment had been superseded or extinguished by the settlement agreement. In para 21 of the judgment, the Court of Appeal held thus:

> [21] Another point is that we agree with the learned counsel for the defendant submission that the learned JC had erred in law and in fact in granting leave to the plaintiff for failure by the learned JC to take into consideration that *there is no longer any pending judgment and/or order of the court to be enforced as the said judgments and/or order have been superseded or extinguished by the settlement agreement entered between the parties on 28 May 2012. The settlement agreement constitutes a new and independent agreement for good consideration. Its effect in law is to supersede the original cause of action altogether and put an end to the proceedings, which are thereby spent and exhausted*. The parties are therefore precluded from taking any further steps in the action. (Emphasis added.)

[43] Similarly, in the present case, notwithstanding the judgment, the plaintiff had agreed by the 2023 settlement agreement to accept the payment of a sum of RM350,000 from the second defendant (including the sum of RM62,500 paid previously under the 2021 settlement agreement) as full and final settlement of the second defendant's obligations as guarantor under the judgment.

[44] Significantly, the 2023 settlement agreement contained no provisions preserving the plaintiff's rights to enforce the judgment in the event the second defendant defaults in his obligations to pay the settlement sum under the said agreement. This is because when one examines the preservation of rights clauses in the 2023 settlement agreement, what these clauses sought to do was to preserve the plaintiff's rights against 'the borrower and the guarantors' under the various facility documents and 'to provide that (the plaintiff) shall be at liberty to commence fresh bankruptcy proceeding and or continue with any or all actions to enforce the rights of (the plaintiff) in the matter, concurrently or otherwise to recover the outstanding sums from (the second defendant).

[45] Insofar as the plaintiff's rights under the 'facility documents', these rights have since merged with the judgment and no longer exist. As regards the plaintiff's rights under the 2023 settlement agreement to commence fresh bankruptcy proceedings and or actions to enforce its rights 'in the matter', this does not refer to the judgment but the rights under the 2023 settlement agreement.

[46] What this means is that the plaintiff's rights under the judgment had been superseded by the terms of the 2023 settlement agreement. Put it in

another way, the judgment is no longer available for the plaintiff to enforce against the second defendant when the plaintiff entered into the 2023 settlement agreement with the second defendant.

[47] Based on the aforesaid, the plaintiff's application under encl 16 simply has no merits and on this ground alone, must be dismissed.

Relationship between s 6(3) of the 1953 Act and O 46 r 2(1)(a) of the ROC 2012

[48] Considerable time was expended at the oral hearing of encl 16 focusing on the application of s 6(3) of the 1953 Act to O 46 r 2(1)(a) of the ROC 2012. The relationship between the limitation provisions in the 1953 Act and the procedural mechanism for leave to enforce a judgment under O 46 r 2(1)(a) of the ROC 2012 needs to be clarified.

[49] The plaintiff filed encl 16 pursuant to O 46 r 2(1)(a) which provides:

> 2. (1) A writ of execution to enforce a judgment or order may not be issued without leave of the Court in the following cases:
>
> (a) Where six years or more have lapsed since the date of the judgment or order.

[50] As can be seen, O 46 r 2(1)(a) merely provides that leave is required to enforce a judgment or order where six or more years have lapsed since the date of the judgment or order. There is no mention of any maximum time period before any judgment or order can no longer be enforced.

[51] Learned counsel for the plaintiff, however, had proceeded with its application under encl 16 on the premise that s 6(3) of the 1953 Act is applicable where more than 12 years have lapsed since the date of the judgment or order which is sought to be enforced. In other words, it is premised on the assumption that the said s 6(3) applies to execution proceedings and that there is an absolute bar to any execution of a judgment after 12 years.

[52] With respect, this is not the case.

[53] The first limb of s 6(3) of the 1953 Act refers to 'an action upon any judgment'. To my mind, this refers to a fresh action commenced on a judgment and not to execution proceedings on a judgment, which is a procedural step taken to enforce a judgment. This means that the commencement of execution proceedings, which is a continuation of the judgment cannot be considered as 'an action upon a judgment' under the aforesaid s 6(3). In fact, this position has been expressly dealt with by the UK courts.

[54] Section 6(3) of the Act is identical to s 2(4) of the UK Limitation Act

1939 ('the UK 1939 Act') which provides:

> An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[55] Section 2(4) was in fact a consolidation of s 8 of the UK Real Property Limitation Act 1874 and s 42 of the UK Real Property Limitation Act 1833.

[56] Prior to 1939, at common law there was no limitation period at all for the enforcement of judgments. There was however a presumption that a judgment is satisfied within a year and a day, known as the 'one year one day' rule.

[57] By the Statute of Westminster the Second (1285), after one year and one day, the judgment creditor may apply to revive the judgment by writ of *scire facias*. Until 1833, there was no time limit to apply for the writ of *scire facias* except that the longer the period that elapsed between the judgment and the application, the greater the formalities required.

[58] In 1833, the Real Property Limitation Act ('the UK 1833 Act') was enacted and by s 40 thereto, any action to recover any sum of money secured by judgment can no longer be brought after 20 years, save for certain exceptions. What this means is that unless a writ of *scire facias* was obtained, a judgment debt became statute-barred for all purposes after 20 years. So, not only were fresh action on a judgment barred, so were execution on the same. More specifically, s 40 stipulates:

> ... no Action or Suit or other Proceeding shall be brought, to recover any Sum of Money secured by any Mortgage, Judgment, or Lien, or otherwise charged upon or payable out of any Land ... but within twenty Years next after a present Right to receive the same shall have accrued ...

(As an aside, it seems that under the Statute of Westminster, the effect of a judgment would bind one half of the judgment debtor's freehold lands, much like a charge or a mortgage. This was why the provision on the judgment was dealt with together with mortgages and liens.)

[59] In 1852, under s 128 of the Common Law Procedure Act, the one year one day rule was abolished. Judgments could be executed at any time within six years without the revival by writ of *scire facias*. Also, the revival by writ of *scire facias* was replaced by a writ of *revivor*. However, the 20 years absolute bar remained.

[60] Then in 1874, s 8 of the Real Property Limitation Act 1874 ('the UK

1874 Act') re-enacted s 40 of the UK 1833 Act in identical language save that the period of 20 years was reduced to 12 years. A year later, in 1875 the Supreme Court of Judicature Act 1875 provided by its s 16 for rules of courts to regulate the procedure of the High Court of Justice and the Court of Appeal. Order 42 rr 18 and 19 of the UK Rules of Court provided that execution of a judgment may issue at any time within six years from the judgment and thereafter leave of court is needed.

[61] In *Watson v Birch* (1874) 15 Sim 523; (1874) 60 ER 721 (*Watson v Birch*), a decision approved by Lord Coleridge CJ of the Court of Appeal in *Jay v Johnstone* [1893] 1 QB 189, it was held that the rules of court did not affect the 20 year absolute bar in the 1833 Act (and by extension the 12 year absolute bar in the 1874 Act). This was the position when the UK 1939 Act was enacted with the s 2(4). In other words, the prohibition applied to both fresh action as well as execution proceedings to enforce a judgment. This was notwithstanding that O 46 r 23 of the Rules of the Supreme Court then in force in UK provided that leave of the courts was necessary to proceed with execution proceedings where more than six years have elapsed from the date of the judgment. The UK courts did not see any inconsistency between the s 2(4) and O 46 r 23.

[62] However, in 1939, the UK Court of Appeal in *WT Lamb & Sons v Rider* [1948] 2 KB 331; [1948] 2 All ER 402 (*WT Lamb & Sons*) held that the right to sue on a judgment is distinct from the right to issue execution on a judgment. Execution is said to be a matter of procedure machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing the judgments or orders. They are to be governed by the Rules of the Supreme Court and the Common Law Procedure Act. On the other hand, s 2(4) deals with the substantive rights to sue for and obtains a judgment.

[63] Scott LJ explained that the definition of 'action' which includes 'any proceedings in a court of law' is to cover fresh actions commenced by originating summons and not writ. These words do not include the procedural machinery for execution proceedings. *WT Lamb & Sons* was followed in subsequent cases.

[64] In 1980, s 2(4) of the UK 1939 Act was replaced by s 24(1) of the UK Limitation Act 1980 ('the UK 1980 Act'). The new section retains the wordings of the repealed s 2(4) but reduced the limitation for actions on a judgment to six years. The definition of 'action' was re-enacted *verbatim* in s 38(1) of the UK 1980 Act.

[65] More importantly, in respect of s 24(1) of the UK 1980 Act, the UK

Court of Appeal in *National Westminster Bank plc v Powney And Others* [1991] Ch 339 (*National Westminster*) had also held that the said section applied only to action to sue on a judgment and not to execution proceedings, adopting with approval the decision of Scott LJ in *WT Lamb & Sons*.

[66] In fact, the House of Lords in *Lowsley and another v Forbes (t/a L E Design Services)* [1998] 3 All ER 897 (*Lowsley*) similarly held that the word 'action' in s 24(1) of the UK 1980 Act meant fresh action and does not include proceedings by way of execution.

[67] *Lowsley* is an interesting case because Lord Lloyd of Berwick had followed the decision of Scott LJ in *WT Lamb & Sons* even though he was of the view that the reasonings were flawed.

[68] It was Lord Lloyd's view that when the UK 1939 Act came into force, s 2(4) therein had preserved the pre-1939 position that a judgment debt shall become statute barred after 12 years. The aforesaid was the reason why Lord Lloyd did not agree with the reasoning of Scott LJ in *WT Lamb & Sons*. He felt that the words 'action or suit or other proceeding' in s 40 of the UK 1833 Act and s 8 of the UK 1874 Act were given too narrow a meaning by Scott LJ.

[69] However, Lord Lloyd opined that the decision of Scott LJ in *WT Lamb & Sons* had not only been treated as correct in subsequent cases, but more significantly, that the UK Parliament, by enacting the UK 1980 Act must be presumed to have accepted the meaning that the courts have ascribed to the words 'action or suit or other proceedings'. More specifically, this was what Lord Lloyd said at p 906:

> Finally Mr Hockman argued that it would be a reduction ad absurdum of statutory construction if your Lordships were to disapprove the reasoning in the *Lamb* case and at the same time hold that it is now the law by virtue of its subsequent adoption by Parliament. But there is nothing new in this. It is Parliament's understanding of the existing law when enacting the Limitation Amendment Act 1980 that matters, not what the law is subsequently shown to have been. As Lord Simon of Glaisdale said in *Black-Clawson International Ltd v Papierwerke Waldhof- Aschaffenburg AG* [1975] 1 All ER 810 at 845; [1975] AC 591 at 648:
>
> > Once it is accepted that the purpose of ascertainment of the antecedent defect in the law is to interpret Parliament's intention, it must follow that it is Parliament's understanding of that law as evincing such a defect which is relevant, not what the law is subsequently declared to be
>
> If common error can make the law, so can parliamentary error.

[70] Based on the aforesaid, His Lordship held that it was too late to hold that Scott LJ was erroneous in his reasonings.

[71] Now, how do all the aforesaid affect our interpretation of s 6(3) of the 1953 Act?

[72] Our s 6(3) of the 1953 Act is an adoption of s 2(4) of the UK 1939 Act. When the Malaysia Federal Council in 1953 adopted s 2(4) of the UK 1939 Act as s 6(3) of our 1953 Act, the position in the UK was that as enunciated by Scott LJ in *WT Lamb & Sons.* This must mean that the Federal Council had approved of the decision in *WT Lamb & Sons* and intended the law in Malaya to be similar to the said decision.

[73] Indeed, in the High Court case of *Re Lim Ah Hee @ Sim Ah Hee, ex p Perwira Affin Bank Bhd* [1997] MLJU 46 (*Re Lim Ah Hee* (HC)), Haidar J, when interpreting our s 6(3) of the Act stated this:

> In so far as the first limb is concerned it would seem clear by the definition of the word 'action' in s 2(1) of the Act that s 6(3) of the Act applies only to the process of bringing an action upon a judgment. It does not extend to seeking execution of a judgment: the latter is a purely procedural step, and is not an 'action' within the meaning of the Act and 'action' is defined to include a suit or any other proceedings in a court of law.
>
> Our Act is modelled on the English Limitation Legislation.
>
> In *National Westminster Bank plc v Powney And Others* [1991] Ch 339; [1990] 2 WLR 1084, the Court of Appeal held that an application to issue, or to extend the time, for execution under a judgment was not an 'action' within the meaning of s 38(1) of the Act of 1980; and that, therefore, an application by the bank for the renewal of the existing warrant or the issue of a new one would not come within the provisions in s 24(1) prohibiting the bringing of an action on a judgment after the expiration of six years from the date on which judgment became enforceable. The Court of Appeal cited with approval another Court of Appeal's case of *WT Lamb & Sons v Rider* [1948] 2 KB 331; [1948] 2 All ER 402.
>
> No doubt in *WT Lamb's* case, the Court of Appeal was considering the respective antecedents of s 2(4) of the Limitation Act 1939 and O 42 r 23 of the Rules of Supreme Court, however, it does provide a guidance to the interpretation of our s 6(3) of the Act.
>
> Section 2(4) of the Act of 1939 would appear to be in more or less similar terms as our s 6(3) of the Act and reads ...
>
> According to Andrew McGee on *Limitation Periods*, 1994, (2nd Ed) at p 60, the effect of the judgment of *WT Lamb* is —
>
> > There is a vital distinction between suing on a judgment and enforcing it. The former involves bringing an action and is subject to the 1980 Act, whereas the latter is purely procedural matter, to which the 1980 has no relevance.

[74] After quoting *WT Lamb & Sons* in *extenso*, Haidar J proceeded to hold that bankruptcy actions do not come within the meaning of writ of execution and therefore no leave was required under O 46 r 2. The learned judge however

held that the judgment creditor could claim recovery of interest beyond the six years under the bankruptcy notice. This decision was appealed upon to the Court of Appeal.

[75] For our purposes, the Court of Appeal in *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [2000] 3 MLJ 211 (*Re Lim Ah Hee* (CA)) by *obiter* confirmed that the word 'action' in our s 6(3) of the 1953 Act (equivalent to s 24(1) of the UK 1980 Act) means 'fresh action' and does not include proceedings by way of execution. The Court of Appeal followed *Lowsley* and *WT Lamb & Sons* without any reservation.

[76] The matter did not stop there and was brought before the Federal Court. In *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 (*Re Lim Ah Hee* ((FC), the Federal Court affirmed that bankruptcy proceeding is an action upon a judgment and not an execution proceeding and is therefore caught by s 6(3) of the 1953 Act. The Federal Court did not disagree with the interpretation of the word 'action' by the Court of Appeal to mean 'fresh action'.

[77] Both Professor Sujata Balan and Mr Chong Joo Tian in their respective well written articles '*The Limitation Periods for Action Upon a Judgment and Execution Proceedings in Malaysia'* and '*Limitation Period for the Enforcement of Judgment: Whether the House of Lords' decision in Lowsley should be followed'* [1999] 1 MLJ lxvii, have referred to the pre-1953 cases of *Daud v Ibrahim* [1961] MLJ 43 (*Daud v Ibrahim*) and *Neo Ong Tew v Neo Ong Tee* [1926] SSLR 120, Court of Appeal Straits Settlement (*Neo Ong Tew*) to suggest that perhaps a different interpretation should be given to s 6(3) of the 1953 Act.

[78] The Court of Appeal in *Daud v Ibrahim* and *Neo Ong Tew* were dealing with the then Kedah Limitation Enactment and the Straits Settlement Limitation Ordinance respectively. Both decisions suggest that the limitation statutory provisions would include proceedings by way of execution and accordingly they created an absolute bar to execution after the stated period of limitation.

[79] However, both the cases were heard and decided prior to the enactment of the present 1953 Act and given the adoption of the *WT Lamb & Sons* decision by the UK in enacting s 2(4) of the UK 1939 Act which we have deemed it fit to adopt without any qualifications and given the decisions by our Court of Appeal in *Re Lim Ah Hee* (CA), I would respectfully decline to adopt the decisions reached in the two cases. In fact, as will be seen below, these two decisions were also not followed by His Lordship Richard Melanjum J (as he then was) in *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (Sued*

as a Firm) [2002] 6 MLJ 579 (HC) (*Koperasi Pembangunan Desa*).

[80] I will now deal with the three cases that learned counsel for the plaintiff had brought to the attention of this court.

[81] The plaintiff referred this court to the case of *RHB Bank Berhad v Yung Chen Wood Industry Sdn Bhd & Ors* [2019] MLJU 1845; [2019] AMEJ 1767 (HC) (*RHB Bank Bhd*). In this case, judgment in default were entered against the second and third defendant on 21 August 2003 and against the fifth defendants on 1 August 2003 but were never executed. Instead, on 29 November 2003, the plaintiff entered into a debt restructuring agreement ('DRA') with the first defendant. The DRA provided that in the event of default, the plaintiff could proceed to enforce any judgment against the second, third and fifth defendants. After the expiry of 12 years from the default judgments, the plaintiff commenced an action against them for breach of the DRA. It was contended that the said action was an execution of the judgment in default and was barred by the 12 year limitation under s 6(3). It was also contended that the cause of action against the second, third and fifth defendant as guarantors had merged into the judgment in default and a second cause of action can no longer be brought.

[82] The High Court held that the limitation provision was no bar to the filing of the action because there was an express term in the DRA that the plaintiff was not to execute its judgment in default against the defendants. The court also held that there was no merger as the plaintiff was suing on the DRA and not the original agreement.

[83] I must confess that it is not easy to appreciate the reasonings of the learned judge. The filing of a fresh action based on the cause of action for breach of the DRA is clearly not an execution of the default judgments. The decision, to my mind, can best be explained on the basis that the DRA had in fact superseded the judgment in default obtained against the second, third and fifth defendants. After all, the plaintiff did in fact sue for breach of the DRA and not on the judgment. This was why the argument on merger of the cause of action into the judgment was rejected.

[84] In fact, the decision in *RHB Bank Berhad* affirmed the finding of this court that the 2023 settlement agreement in the present case had superseded the judgment and if at all, the plaintiff in this case should commence an action against the second defendant under the said agreement instead of seeking leave to enforce the judgment.

[85] The plaintiff also referred to the case of *Koperasi Pembangunan Desa*.

[86] In the that case, the plaintiff obtained judgment in default against the defendant on 1 February 1985. Attempts made to execute the judgment within six years of the same proved futile for various reasons including the fact that the court dockets could not be traced. Subsequently in 1993, an application was made for leave to execute the judgment. The application was struck out when the parties entered into settlement negotiations. In 1999, a fresh application for leave to execute was filed and heard in 2000 before the deputy registrar. The application was dismissed on the ground that the word 'suit' in s 3 of the Sabah Limitation Ordinance included 'execution proceedings' and since more than 12 years had lapsed, the application was statute barred.

[87] On appeal to the High Court, Richard Malanjum J (as he then was) in exercise of his discretion under O 46 r 3 of the then Rules of the High Courts 1980 ('the RHC 1980') held that leave ought to be granted to the plaintiff to execute the judgment in default. Significantly, in addressing the contention that the word 'suit' should include execution proceedings, the learned judge held as follows:

> For the defendants, it was contended that the word 'suit' in s 3 of the Ordinance should include execution proceeding. It was submitted that since the application for leave was made after the period of 12 years from the date of judgment, it was therefore caught by the Ordinance and thus [2002] 6 MLJ 579 at 587 statute barred. The case of *Neo Ong Tew v Neo Ong Hee* (CA) 9 *Mallal's Digest* para 2053 and *Daud v Ibrahim* [1961] MLJ 43 were cited in support of the argument.
>
> Now in *Neo Ong Hee*, an attempt was made to enforce the judgment after a lapse of 20 years. Article 98 of the Strait Settlement Ordinance No 56 (Limitation) was relied upon. Therein, the word 'suit' was defined as including 'any action or other proceeding'. It was held that the execution proceeding by the judgment creditor was a suit and thus statute barred. In *Daud v Ibrahim*, an application for an order to show cause on the part of the appellant in relation to the transfer of the land was made by the respondent based on an earlier order obtained from the court. However, it was made after a lapse of 12 years from the date of the judgment. It was held that since the proceeding was not made within the 12 years limitation period, it was therefore statute barred.
>
> For the plaintiffs, an unreported case of *Tractors Malaysia Bhd v Tio Chee Hing* [1993] MLJU 521 was relied upon. There it was held that the word 'suit' under the Ordinance did not include an execution proceeding. The principle in *WT Lamb & Sons v Rider* [1948] 2 KB 331; [1948] 2 All ER 402 and *National Westminster Bank plc v Powney And Others* [1991] Ch 339 was followed. Similarly in the case of *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [2000] 3 MLJ 211 it was held that the word 'action' in the Limitation Act 1953 referred to a fresh action and not to an execution proceeding. The English case of *Lowsley and another v Forbes (t/a L E Design Services)* [1998] 3 All ER 897 was referred to in support of the preposition held.
>
> From the submissions of learned counsel for the parties, I am in agreement with learned counsel for the plaintiffs that there are two ways of looking at the issue. One

is on the interpretation of the word 'suit' as defined in the Ordinance, and the other is to see whether the application is statute barred in view of the facts and circumstances of this case.

I will deal first, whether the application of the plaintiffs is in fact statute barred. From the facts of this case as given above and taking a simplistic approach, it is plain that the plaintiffs did apply to execute on the judgment as early as 1987 followed by a second application in 1993 and a third application in 1999. There was no hearing for a number of years as the court docket was missing. I am inclined therefore to agree with the contention of learned counsel for the plaintiffs that in view of the application being made by the plaintiffs before the 12 years limitation period, there should be no question of applying any of the provisions of the Ordinance since time would have stopped running once the application was filed and in this case in 1987 as well as in 1993.

In respect of the meaning of the words 'suit' and 'action' used in the Ordinance and the Limitation Act 1953 respectively, I agree with the contention of learned counsel for the plaintiffs that the two words should provide the distinguishing factor between the present case and the case of *Daud v Ibrahim*. In that case, the court was dealing with the word 'action' and not 'suit' as in the Ordinance. Hence, the principle therein would not be wholly applicable in Sabah. It is also my view that the word 'suit' itself should be self explanatory in that it should be confined to a fresh action and not to a proceeding which is a continuation of an existing action.

For the reasons above, I am therefore not convinced with the argument of learned counsel for the defendants that the application for leave to execute by the plaintiffs is statute barred. Accordingly, I grant the orders as prayed for by the plaintiffs in encl 25 herein.

[88] Although a distinction was made between the word 'suit' and 'action' in *Koperasi Pembangunan Desa,* it is my judgment that given the judgment in *Re Lim Ah Hee* (from the High Court to the Federal Court) and following the decisions in *Lowsley*, *WT Lamb & Sons* and *National Westminster* the word 'action' which is defined to include 'suit and any proceeding in the court of law' in the 1953 Act can only mean fresh action and not execution proceedings.

[89] What is significant is that *Koperasi Pembangunan Desa* does not hold that the execution proceedings under O 46 r 2(1) are subject to the statutory bar under s 6(3) of the 1953 Act. In fact, the High Court in that case adopted the principle in *WT Lamb & Sons*, *Lowsley* and *Re Lim Ah Hee*.

[90] Finally, there is the case of *Seema Development Sdn Bhd v Mah Kim Chye* [2014] 2 MLJ 425; [2014] 1 CLJ 804 (*Seema Development*). This was a decision that squarely deals with the issue whether leave given by the court to proceed with execution of a judgment after more than 12 years had elapsed is subject to the limitation under s 6(3) of the 1953 Act. The plaintiff in that case applied for and was granted leave to execute the judgment nearly 16 years after the judgment was obtained. The defendant applied to set aside the leave on the

ground that the application was statute barred.

[91] His Lordship, Justice Lee Swee Seng (as he then was) referred to the Federal Court case of *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179; [2013] 3 CLJ 317 (*AmBank v Tan Tem Son*) where Ahmad Maarop FCJ held that a bankruptcy action is not a mode of execution within the meaning of O 46 r 2 of the RHC 1980 but is an action on a judgment and hence subject to the 12 year limitation under s 6(3) of the Act.

[92] The learned judge then proceeded to hold as follow:

> 17 A fortiori, an execution process for which leave is required would also be subject to the limitation of 12 years under s 6(3) of the Limitation Act 1953. There is no statutory exception to this. In *Daud v Ibrahim*, the delay was 12 years and five days after taking into account the moratorium period because of The World War II. Yet the court did not because the court could not extend the strict limitation period of 12 years where no exception has been provided for.

[93] Based on the aforesaid, the learned judge held that the leave application was statute barred and allowed the defendant to set aside the order.

[94] With respect to the learned judge, the Federal Court in *AmBank v Tan Tem Son* had applied s 6(3) of the 1953 Act and not O 46 r 2 of the RHC 1980 precisely because the Federal Court had opined that bankruptcy proceeding is not an execution proceeding. On the contrary, the application that was before the learned judge in *Seema Development* was in respect of execution proceedings under O 46 r 2 of the RHC 1980.

[95] Further, the principle in *WT Lamb & Sons*, *Lowsley* and *Re Lim Ah Hee* was not brought to the learned judge's attention.

[96] In the instant case, the plaintiff is in fact seeking leave of this court under O 46 rr 2 and 3 of the ROC 2012 to proceed with a fresh bankruptcy notice against the second defendant. In this regard, the Federal Court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1; [2015] 4 CLJ 561 (*Dr Shamsul Bahar*) has clarified that whilst both the Federal Court cases of *Re Lim Ah Hee FC* and *AmBank v Tan Tem Son* had held that bankruptcy proceeding is not execution proceedings and therefore come under the ambit of s 6(3) of the 1953 Act, it does not mean that leave to issue bankruptcy notice need not be obtained after more than six years had elapsed from the date of the judgment.

[97] In *Dr Shamsul Bahar*, the Federal Court was dealing with the interpretation of s 3(1)(i) of the Bankruptcy Act 1967, more specifically the

A phrase 'If a creditor has obtained a final judgment or final order against him for any amount and *execution thereon not having been stayed* ...'.

[98] The Federal Court had held that by the aforesaid phrase, before a bankruptcy notice can be issued, the judgment creditor must be able to proceed with execution immediately. Since this was not the case after six years have elapsed from the date of judgment (unless leave is obtained), the Federal Court held that a bankruptcy notice in such a case could only be obtained after leave of the court under O 46 rr 2 and 3 has been granted.

[99] However, even if leave could be obtained by the plaintiff to proceed with execution under O 46 rr 2 and 3 of the ROC 2012 in this case, since more than 12 years have elapsed, any bankruptcy proceeding against the second defendant based on the judgment would have been statute barred in any case. This is because the 12 year limit set in s 6(3) of the 1953 Act is an absolute bar. Accordingly, quite apart from my finding that the judgment has in fact and in law been superseded by the 2023 settlement agreement, the plaintiff's application under encl 16 is also to be dismissed for this reason.

[100] Before concluding, I must also address the concern expressed by Professor Sujata Balan and Mr Chong Joo Tian in their respective articles that following the approach in *Lowsley* would mean that there is effectively no time limit to execution proceedings and therefore no finality to litigation. To my mind, there can be a variety of reasons why there need not be any time limit to enforcement of a judgment, for examples, there may be an order to stay execution of the judgment or the judgment debtor may actively seek to avoid execution against him, residing out of jurisdiction and returning after some time or the judgment debtor may after some years encounter a favourable change to his financial position. Order 46 r 2(1)(a) of the ROC 2012 provides the safeguard that leave from the court is needed to enforce the judgment where more than six years have elapsed since the date of the judgment or order. In addition, the judgment creditor cannot claim recovery of interest beyond the six years from the judgment.

CONCLUSION

[101] In the premises and for the reasons stated above, the plaintiff's encl 16 is hereby dismissed.

Application dismissed.

Reported by K Selvaraju